

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

UNITED STATES FIDELITY  
AND GUARANTY COMPANY,

Plaintiff,

v.

NO. 2:97CV170-S-B

MIKE TOLIVER AND  
CAROLYN TOLIVER,

Defendants.

OPINION

In this declaratory judgment action, plaintiff seeks a determination that it is not obligated to indemnify defendant Mike Toliver in a civil action filed by his wife, Carolyn Toliver, in the Circuit Court of Panola County, Mississippi. Presently before the court is plaintiff's motion for summary judgment and defendants' alternative motions to hold this cause in abeyance, for abstention, or to dismiss without prejudice.

The facts underlying Mrs. Toliver's accident are not disputed. According to the state court complaint, in June, 1994, Mrs. Toliver was cutting grass at the Tolivers' Panola County farm using a 1974 Case Cub Lo-Boy tractor, and "the front wheel of said tractor encountered a hole in the ground, which snatched/jerked the steering wheel, causing [her] to be thrown to one side of the tractor, all of which resulted in injuries and damages." Mrs. Toliver named her husband, Case Corporation, Case International Corporation, and International Harvester Corporation as defendants. As to Mr. Toliver, she alleged that he knew or should have known of the "defective, dangerous, and extra-hazardous condition of the premises and/or the unreasonably dangerous, defective, and extra-hazardous condition of the subject mower, which existed on the defendant's property," and therefore furnished her an unreasonably dangerous instrumentality with which to perform farm work and failed to provide a reasonably safe place of employment. At the time of the accident, Mr. Toliver was

insured under a USF&G policy which was comprised of a Business Auto Coverage Form, a Farm Liability Coverage Form, and a Farm Employers Liability and Farm Employers Medical Payment endorsement. USF&G provided Mr. Toliver with a defense in state court under a reservation of rights and indeed was successful in obtaining his dismissal by summary judgment.

As grounds for the instant motion, USF&G maintains there is no coverage under either the forms or endorsement noted above. Each will be discussed in turn, beginning with the Business Auto Coverage Form. Under that form, damages are paid only when an accident involves a “specifically described” covered auto. In this case, the vehicle schedule attached to the policy lists five vehicles but does not include the subject Cub tractor. Furthermore, as defined in the policy, the tractor is not an “auto,” which “means a land motor vehicle, trailer, or semitrailer designed for travel on public roads but does not include ‘mobile equipment.’” In turn, “mobile equipment” is defined as “[b]ulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads.” The subject Cub tractor is indisputably a machine which is designed and utilized for use principally off public roads, and defendants do not contend otherwise. *See Wilcher v. Michigan Mutual Insurance Company*, 691 F. Supp. 1019, 1021 (S.D. Miss. 1988) (farm tractor is vehicle designed mainly for use off public roads). Therefore, since the Cub tractor is not listed as a “specifically described auto” in the vehicle schedule and indeed is excluded from coverage under the definition of “auto,” the business auto policy does not provide liability coverage for Mrs. Toliver’s accident.

Likewise, there is no coverage under the Farm Liability Form. That form provides payment for “those sums that the ‘insured’ becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” However, it excludes liability coverage for bodily injury to any “insured,” which in turn “means you, and if you are: (1) An individual, ‘insured’ means the following members of your household: (a) Your relatives.” Mrs. Toliver is a resident relative in Mr. Toliver’s household. She is therefore an “insured” under the farm liability policy and is excluded from any liability coverage in her claims against her

husband.

Finally, the court turns to the question of coverage under the Farm Employers Liability endorsement, which provides coverage for bodily injury to a “farm employee.” That term is defined as follows:

“Farm employee” means any insured’s employee whose duties are principally in connection with the maintenance or use of the “insured location” as a farm. These duties include the maintenance or use of the insured’s farm equipment. But “farm employee” does not mean any employee while engaged in any insured’s business pursuits other than “farming.”

Therefore, for liability coverage to exist under this endorsement, Mrs. Toliver must be a “farm employee.”<sup>1</sup> Having carefully considered the matter, the court has no hesitation in finding that Mrs. Toliver was not a “farm employee.” It is clear from the language of the endorsement that an employer-employee relationship must exist before coverage will be triggered. Both Tolivers admitted in deposition testimony the following matters which negate any inference that Mrs. Toliver was an employee of her husband as that term is defined under Mississippi law, *see, e.g., Walls v. North Mississippi Medical Center*, 568 So.2d 712, 715 (Miss. 1990), or generally understood in everyday parlance:

- Mrs. Toliver never applied for a job on her husband’s farm, nor did Mr. Toliver interview her for a job or hire her as a farm employee.
- Neither Mr. nor Mrs. Toliver considered him to be her boss.
- Mr. Toliver did not pay Mrs. Toliver an hourly wage, she was not on salary, and she did not receive a paycheck from her husband.
- Mrs. Toliver had no set working hours.
- Mrs. Toliver shared equally with her husband in the profits and expenses of the farm.
- Mrs. Toliver’s name was on the farm checking account, and she paid the bills and signed the paychecks of the two men who were listed on the Tolivers’

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<sup>1</sup>USF&G did not argue against coverage under this endorsement based on Mrs. Toliver’s status as an “insured.” Certainly, if she is an insured, she cannot also be an employee. *See Nedrow v. Unigard Security Insurance Company*, No. 24079, 1998 WL 804783, at \*3 (Idaho Nov. 20, 1998). (“It is not a reasonable reading of the policy to say that an insured is his own employee”).

income tax return as “employees.”

- Mrs. Toliver was not listed on the tax return as an “employee.”
- Mr. Toliver never completed a W-2 form on Mrs. Toliver and did not withhold social security, medicare, or state income taxes on her.

In short, to paraphrase Mr. Toliver, the relationship that Mr. Toliver had with his wife was not the same relationship he had with the men listed on his income tax return as “employees.” Therefore, as Mrs. Toliver was not a “farm employee,” she is not covered under the Farm Employers Liability endorsement. *See Nedrow v. Unigard Security Insurance Company*, No. 24079, 1998 WL 804783, at \*3 (Idaho Nov. 20, 1998) (“‘Farm employee’ is not reasonably subject to conflicting interpretation concerning partners in the partnership. The partners are each an insured under the policy”); *Savoie v. Fireman’s Fund Insurance Company*, 347 So.2d 188 (La. 1977) (insured’s neighbor and first cousin was not farm employee under insurance policy even though he was driving tractor on insured’s farm when accident occurred; insured did not select or engage cousin from potential employees, did not pay cousin wages, and did not have right to control or dismiss cousin).

In sum, no coverage exists for Carolyn Toliver’s injuries under any form or endorsement of Mike Toliver’s insurance policy with USF&G, and plaintiff’s motion for summary judgment is therefore granted.. Before reaching this conclusion, the court did consider the Tolivers’ requests to hold this cause in abeyance, for abstention, or to dismiss without prejudice but found none of the arguments offered in that regard persuasive. First, both this court and the state court reached the same conclusion as to Mrs. Toliver’s status as a “farm employee,” and thus, there is no conflict in the opinions of the two courts. And second, although the initial phase of the state court proceeding is concluded as to Mr. Toliver, an active controversy remains, as without a coverage determination in this action, USF&G would have been forced to continue its defense of its insured through the appeals process in state court. Defendants’ alternative motions are therefore not well taken and are denied.

An appropriate order and final judgment shall issue.

This \_\_\_\_\_ day of February, 1999.

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SENIOR JUDGE